IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

JEFF BOARDMAN, DENNIS RANKIN, ROBERT SEITZ, TODD L. WHALEY, LLOYD D. WHALEY, SOUTH BAY WILD, INC., MISS SARAH, LLC, and MY FISHERIES, INC., Plaintiff, vs. PACIFIC SEAFOOD GROUP, et al., Defendant.	No. 1:15-cv-00108-MC

BE IT REMEMBERED THAT on the 22nd day of March, 2018, the above-entitled matter came on for hearing before the HONORABLE MICHAEL J. McSHANE, District Court Judge.

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PROCEEDINGS

Sunday, April 1, 2018, at 2:06 p.m.

THE COURT: Please remain seated. Thank you, folks. Good afternoon, everybody. Let's go ahead and go on the record, and we will call the case.

COURT CLERK: United States District Court for the District of Oregon is now in session; the Honorable Michael J. McShane presiding.

Now is the time set for civil case 15-00108, Boardman, et al., versus Pacific Seafood, et al., oral argument on a motion.

THE COURT: If I could have the attorneys, starting with plaintiff's counsel, please introduce themselves for the record.

MR. HAGLUND: Michael Haglund, and with me is Mike Kelly, and my associate, Eric Brickenstein.

THE COURT: Thank you, Mr. Haglund.

MR. FOSTER: Your Honor, I am Randy Foster from Stoel Rives, and to my immediate left is Tim Snider, and to his left is Rachel Lee.

THE COURT: It looks like a lot of people. I have a number of clerks who have been helping me on the various cases, so there's also some students from the Anti-Trust Class, University of Oregon who have

joined us today.

So I am going to ask you to do a little old-school style, and that is begin your argument by describing, not in -- obviously, I've read much of your briefing. But if you could describe a little bit, for the sake of some of our students, your claims, and it doesn't have to be a lengthy opening argument. Maybe an overview of the case, but with regard to this case.

I would like to start with plaintiffs. Mr. Haglund.

MR. HAGLUND: Thank you, Your Honor. This case originated in January of 2015, arose out of a notice that we received from counsel for Pacific Seafood Group that their client, Pacific Seafood, was negotiating, or in the process of putting together a transaction under which they would acquire Ocean Gold Seafood, and all of its related companies.

Ocean Gold Seafoods is the largest seafood processor on the West Coast, headquartered in West Port, Washington. Its affiliated companies include Ocean Protein, which is the largest fish meal processing plant that processes fish waste, head, guts, et cetera, tails, into fish meal product. And they also have the largest capacity flash freezing and cold storage facility that's owned by a company called Ocean Cold.

Now, after receiving that notice, we contacted a variety of our clients, who included the five, I think, class representatives in the Whaley case. We talked to other fishermen, ultimately learned that our clients had grave concerns about the additional concentration in the market that would occur from Pacific Seafood acquiring Ocean Gold Seafood. We had secured a Temporary Restraining Order in the prior Whaley case against the very same transaction, and thought it was dead.

THE COURT: In terms of transaction, we're just talking about, in this case, the West Port facilities of Ocean Gold?

MR. HAGLUND: That's the entirety of their facilities, I believe, Your Honor. So we investigated, told Pacific Seafood we objected. We received information through the fairly sieve-like, dock-talk system that exists on the waterfront that the transaction was about to close, to our surprise.

And we called up Pacific Seafood counsel. This is also confirmed in the 9th Circuit opinion, but we called up Pacific Seafood's counsel and asked for a representation that the transaction was not going to close at the end of that week in January -- or the Friday was January 23rd in 2015, when the accounts of

John Stephens, one of Pacific's lawyers -- or still one of Pacific's lawyers said, No, I don't know.

So we then proceeded to file suit to challenge that, or to stop that transaction from occurring. The very next day secured a TRO from Judge Panner, and then briefed up the -- there were two competing motions then briefed, Your Honor, or filed and briefed; motion to dismiss on the part of Pacific Seafood Group, a motion for preliminary injunction on our part. Both were heard in Medford before Judge Panner.

And ultimately, in March, Judge Panner issued a preliminary injunction. That subsequently was appealed to the 9th Circuit and argued nine months later, and the case was stayed by Your Honor while it proceeded up to the 9th Circuit.

Ultimately, as to the preliminary injunction, the 9th Circuit, in a pretty comprehensive opinion, affirmed the broad preliminary injunction in its entirety. The case then is back before Your Honor, and we proceed with some discovery.

And what, I think, leads us here today is the fact that when we made our expert witness disclosures, our expert, our then-expert, Dr. Hans Radtke, clarified his opinion slightly from that which

he offered at the time of the preliminary injunction.

But before I shift to that part of our argument, Your Honor, I would like to address some of the briefing that came in just in the last ten days where we are charged, I think, with a pretty serious charge, my law firm and the plaintiffs in this case. And I want to address that briefly before turning to the merits of the Pacific Seafood motion.

In that briefing that they filed a week ago Monday, they contend that the three plaintiffs in this case are nothing more than straw men who have no interest in what is occurring in this case, and that our firm is colluding with third parties to try to force the sale of the Ocean Gold company and its affiliates at a depressed price.

And effectively, it's a very serious charge that we're attempting to commit a fraud on the Court through collusion with third parties disconnected from our true plaintiffs. And we filed a declaration from every one of the remaining three plaintiffs in the case last Friday, declaration from me, declaration from Ed Backus and Richard Carroll who -- all of them stating -- completely rejecting this, I think, extraordinary stretch of a theory by Pacific Seafood Group. We take our responsibility as officers of the court seriously.

We -- this case began because -- we had four of the class reps as plaintiffs in this case. We had three -- we have two remaining.

THE COURT: You are left with three plaintiffs who, quite frankly, it does seem like at times you are a case in search of a plaintiff. You have three plaintiffs who don't fish for whiting. That's one of your markets. You have got two plaintiffs who haven't been to the West Port market in 20 years, and you have one that's been six years.

So it is -- and I understand that these allegations have been made about some sort of collusion, but, I mean, that has to do with some counterclaims and discovery on counterclaims that we will get to.

But one of the threshold matters is the anti-trust standing and anti-trust injury. That's where I am starting to struggle with where you are at with your plaintiffs. Despite their good faith intentions of helping competition in the fishing markets, have these folks actually suffered any anti-trust injury?

MR. HAGLUND: Yes, they have. And let me explain. What Pacific Seafood is trying to do at this point, in this case, is preemptively lock the plaintiffs into the statement in Dr. Radtke's expert witness disclosure that was filed -- or was tendered to them on

June 30th where he states that there are six relevant markets on the West Coast. And his declarations in the Whaley case, along with Professor Wyland in the Whaley case. And then his declaration in this case in February of '15 he states the market is the whole West Coast, from Fort Bragg to the Canadian border.

But in his expert witness disclosure that was filed or tendered to the other side on June 30th, he says that there are six relevant geographic markets, but he also says on page 37 of that roughly 50-page disclosure that Pacific Seafood's dominance in the West Port market is six -- or tied to port clusters and the geography tributary to each port cluster.

But he says in that very disclosure that Pacific's dominance in the West Port market will impact markets to the south, to the detriment of fishermen, coastal communities, and the environment. He also says on the very same page that he reserves the right to supplement his disclosure, based upon ongoing discovery and in response to Pacific Seafood's own expert reports, none of which have been produced yet.

And we have a situation, Your Honor, where in my experience the issue of market definition in an anti-trust case is a very complex one. And it's complex in its nuance, because you are at the intersection of

anti-trust law and the field of economics. And in the typical case, and we handle quite a number of these, the plaintiff generates its expert witness disclosure, then the defendant does the same, and the plaintiff then responds in some sort of rebuttal filing.

And between the time of the initial disclosure by an expert and the final expert witness statement that is generated before -- under the wave of filings that precede an actual trial, you will see clarification, modification, change based upon discovery, and comment from the other side. We never got through that process.

THE COURT: There's still a threshold matter of anti-trust injury. And if I am understanding right, you seem to be conceding, maybe your three plaintiffs, represented plaintiffs, may not be injured in the West Port market, but under an umbrella theory --

MR. HAGLUND: No, we're not -- we do not concede that or take that position. If you look at -- just under Dr. Radtke's report, and to the -- because if you treat it as six markets, they still have involvement because they all have Washington permits. The two fishermen, Lloyd Whaley and Dennis Rankin, who remain in the case, who have Federally issued, through the National Marine Fisheries Service IFQ, or Individual

Fishing Quota, share in each of the species, including whiting. The areas where one can fish as a holder of that quota share for West Coast groundfish is the entire Federally regulated zone where those species abound, which is from the northern half of California to the Canadian border.

So Mr. Whaley, for example, he leases out his Federally regulated quota share, so a concentration in one of six markets, or the entirety of the West Coast, depending upon how it ultimately shakes out, as we work through the balance of discovery and Dr. -- Professor Sexton issued his disclosure, we have got involvement in those markets. And the leasing opportunity for both plaintiffs as to quota share is very much impacted by a concentration in whatever market you have got.

You also have changes, Your Honor, just in the biological abundance and migration of the species. Dr. Radtke points out that one of the reasons he doesn't identify the Eureka port cluster in Northern California as a whiting market is that it has been four or five years since whiting were down that far south and caught and delivered to Eureka.

So you can have changes in biological abundance in the future that have a fisherman who was

concentrating in Central Oregon, off the Central Oregon coast, is -- and we cite to the deposition of lead plaintiff, Jeff Boardman, on this very point where he makes the point that he's been -- he's caught shrimp. He's a shrimp specialist off of West Port in the last several years within ten miles of West Port, but steamed south to deliver it to Newport.

The reality is that he's got a Washington permit to shrimp, and the biological abundance is there. And he says, I have delivered into West Port in the past. There's the potential he might deliver to West Port in the future.

THE COURT: How is that different than the case where there's loss of potential for -- you know, cinema owners, or the guy who developed some sort of pest-control device where he planned on going into these markets in the future, and he could certainly get into the markets in the future but the activity wasn't causing him any particular -- the plaintiff in this case, any particular individualized anti-trust injury, other than making it more difficult for his investments in the future?

MR. HAGLUND: Let me make this point, Your Honor. In this case, in Boardman, there's no claim for damages. We have had serious interest by the State of

Oregon in this case with them having filed an amicus brief in support of the injunction back in the spring of 2015. A brief in which they said, This level of additional concentration is presumptively unlawful under the anti-trust laws.

But we are solely -- this is a very important distinction going directly to the point you just made. We are not suing under Section 4 for treble damages of the Clayton Act. We're suing under Section 16, where you are only seeking injunctive relief under Section 16, the standing requirement is much, much lower. In fact, it drops all the way to just general standing. Where if you are proximately hurt in any way -- you don't have to be a market participant.

The cases you were just referencing are cases where the courts say, if you are going to sue for treble damages, you have to be a participant in the market in which you are seeking damages. And there are cases that go down that road, but one also has to look carefully at what the Supreme Court has said, especially in this context of Section 16, and in Section 4, which is more applicable to the Seawater case. And I will get into that in terms of the McCready case when we are arguing that case.

But it's really important to recognize that

all we have to do is show a potential impact on leasing quota share, a potential to have the -- as professor or Dr. Radtke says, concentration and lower prices in one of the six markets, if we are locked into that six-market notion, will negatively impact markets to the south. That is enough if all you are seeking is injunctive relief. And there's no question about that, given the way the cases --

THE COURT: How is that different than the umbrella theory, which -- I mean, there's still a question of whether it's applicable to injunctive relief.

MR. HAGLUND: Umbrella theory is one that goes to damages. And that's one of the issues we had in Whaley. The umbrella theory is that if competitors are conspiring -- or in the Whaley case, the theory was that Pacific is setting the price. Everybody else is following. They have driven the prices down and they are responsible to all fishermen, regardless of who they deliver to, for that price suppression. That was going to be a major issue on appeal had the case not settled.

But the umbrella is that -- the umbrella was Pacific's price setting, allegedly. And regardless of whether you are delivering to Pacific or somebody else, they are responsible for the umbrella of impact

that they have. The umbrella issue has no relevance here whatsoever, because we're not -- we are only seeking to enjoin an illegal acquisition that could impact the industry generally, which we -- our clients participate in. So the umbrella theory is not applicable in this instance.

Now, even if -- the other point I would like to make is that even if we're locked into this six-market notion, which I don't think we are because --

THE COURT: They are locking you in, but I am looking at the language in my order: New expert witness may not testify in any manner that is contrary to, or inconsistent with, Dr. Radtke's disclosure.

It does seems like you are trying to bootstrap his disclosure into really having a new expert testify about a whole new set of markets. You did tell me there wasn't any problem with Dr. Radtke when he put together the report. The question is whether he was able to defend his report, if he had the mental acuity to do it, and he said he did not. And now it appears you are going beyond using your new expert to defend your expert disclosure. He's doing his own work and he's going to present an entirely different disclosure.

MR. HAGLUND: No. No, we don't take that position. And in fact, in your order you noted that

Dr. Sexton was entitled to do his own work, write up his report in his own way, and it just couldn't be fundamentally inconsistent with Dr. Radtke's conclusions.

And when you look at what -- at the total context, which includes a declaration from Dr. Radtke in Whaley, a declaration by Dr. Radtke in this very case. In connection with the preliminary injunction, he was the key declaration. And he was saying it's a west side market -- West Coast market. Here, he says it's six, but they influence each other. And it's his initial disclosure. He's entitled to -- he would have been entitled, if he stayed in the case, to respond to discovery.

For example, just a practical example, when the disclosure was prepared and tendered to the other side, the depositions of the police officers had not occurred, and certain information wasn't even known to us until documentation was produced after that disclosure and the deposition unfolded. We learned that Dennis Rankin goes significantly farther than 100 miles from the place of his place of business, harvest to deliver, in the wintertime when he has one of his two commercial fishing vessels fishing for petrale and dover sole way up near the Canadian border area, and

delivering into Bellingham.

Dr. Radtke had no market up there, based on his initial report. That was one of the areas that was going to have to be addressed in his review of what comes out in discovery.

We have to have some play in the works associated with the fact that it was an initial disclosure, subject to change based upon clarification, based upon ongoing discovery, and what the defense experts come up with.

So I think you are going to be able to assess, down the road, when Dr. Sexton is in a position to prepare his report, to see whether or not we have somehow tried to take unfair advantage of a substitution that had to take place for reasons over which we had no control.

So the other point I would like to make about the -- even if we're stuck with the -- with this effort to handcuff us to six markets, without recognizing the qualifying points made regarding impact on neighboring markets that is in Dr. Radtke's report, that we have a situation here where we have got the impact on the potential leasing opportunity, which Dr. Sexton speaks to. You have got the changing biological --

THE COURT: But has your client spoken to it? I am having a hard time -- Rankin can go up 100 miles farther than you thought, but when it came to Astoria, he said, I am happy where I am. Boardman said he would never leave. So -- I mean, I am still trying to figure out where their injury is, and maybe I am having a harder time understanding the lease agreements that they have, and these quotas that they have, and how that fits into it. And is discovery going to show us something, that there's actual injury to these folks?

MR. HAGLUND: I will make two points there. If you look at our brief, we quote the statements by our clients as to why they are pursuing this case. And the reason is that they are very concerned about excess concentration, and it's their view that excess concentration in one area impacts them to the south or to the north.

And I think that makes good economic sense, and it's supported by what is in the record now in terms of what Dr. Radtke's disclosure says. And it's supported in the record now by what Dr. Sexton says about leasing. And Mr. -- Fisherman Lloyd Whaley pointed -- there's a detailed paragraph in our brief that describes what he does in connection with leasing his quota share. He can lease his -- he has whiting

quota shares that he leases, along with all the groundfish species to other fishermen, who then fish that quota. And they can -- he can lease it to anyone within the West Coast-wide bounds of where that quota share is valid. So that makes him necessarily impacted in West Port. And that --

THE COURT: How does the lease work? Is he leasing on a flat fee or on their catch?

MR. HAGLUND: Basically what happens is they lease on a value per pound. So if you lease 10,000 pounds of your 180,000 pounds of quota share in a given species or two, to a particular fisherman, maybe it's a black cod or sable fish specialist, maybe it's a dover sole, but you are -- there's an exchange. And you can go through that exchange. You may find your own lessees, but you basically are paying a fisherman who is going to have that -- you have to assign that quota share to a vessel under the NMFS system.

And a fisherman who then has to go out to catch that has to have pounds himself, plus whatever he's leased. And he can't go over that total. But it's dollars per pound is how these are negotiated.

And if concentration in one market results in a lowering of the average wholesale lease cost for pounds in that particular species, that's how these two

plaintiffs who can lease, and one of them is leasing all of it, and has been for a few years now, are impacted and suffer specific anti-trust injury backed up by what Professor Sexton says in his declaration.

The other point that I would like to make on anti-trust injury, Your Honor, is that if you look at the McCready case, the plaintiff, the Supreme Court said, was qualified to pursue in that instance, a Section 4 damages case, was not a participant in the market.

In the McCready case, the Blue Shield versus McCready case, Blue Shield conspired with the Psychiatric Society of Virginia to exclude from the insured segments of the medical insurance market psychotherapeutic services that were rendered by clinical psychologists. The participants in the affected market are psychiatrists and psychologists. The case wasn't brought by psychologists, it was brought by a person who had insurance.

THE COURT: The consumer.

MR. HAGLUND: The consumer. And they were one step removed from the market participants. And this is more for Front Street in the next case, but it shows that especially where you are -- you don't have to be an actual participant if you are impacted.

THE COURT: What is the tuna fisherman case where the fisherman had -- their wages are based on anti-competitive --

MR. HAGLUND: That's the Eagle case. And it's very distinguishable. This was an issue in Whaley, as well, Your Honor, because the question there was within the class of Whaley plaintiffs, they clearly -- there's no question that whoever owned the boat and was selling the fish to Pacific Seafood, or other processors in that case, was a qualified plaintiff.

The Eagle issue is whether or not the captain, who is a nonowner in some instances, and the crew, who -- in the fishing industry everybody works on a percentage of the catch basis. In other words, you are a joint venturer and that was going to be the argument. If you are a joint venturer getting, as the captain, say, 40 percent and the crew gets 20 percent, do you qualify as a plaintiff.

We don't have this issue in this case. Every single one of these three plaintiffs is completely outside of Eagle, because they are the owners of their boats. And they are the ones engaged in the sale of these fish to processors on the West Coast. So Eagle is a nonissue.

I guess, in wrapping up, Your Honor, we

filed this case -- these three fishermen filed this case to stop Pacific Seafood from being able to achieve company town status in West Port, Washington, which is what will happen if they are successful in acquiring the highest capacity processing plant, highest capacity flash freezing and cold storage plant, and highest capacity fish meal plant on the West Coast.

We have a significant, very recent decision that we have been waiting -- we're waiting almost a year to learn how it was going to turn out, and it shows that our concerns are legitimate. I am referring to Judge Gilliam's decision in late February on a case where cross-motions for summary judgment had been pending for over 11 months.

That's the case where Pacific Seafood challenged the entire quota system, or more specifically challenged the limits on aggregate quota share holdings as illegal. And that case -- the opinion is extraordinarily well-written. We filed it as a status report in connection with the Innovation Marine case, but it also has relevance here.

What that record revealed was that Pacific Seafood in Eureka, Northern California, has, according to the paperwork that we have in this -- in the patent data that's part of this case, has over 90 percent, I

think it's 96 or 97 percent share of all of the fish deliveries in that Northern California zone.

The record in -- and it's in Judge Gilliam's opinion, they were challenging the limits on how much quota share they can own on the grounds that it was impinging their ability to have -- to control as much of their own catch as possible.

And that opinion, I think on page 5, notes that Pacific Seafood's plant there, called Pacific Choice, has over half of its groundfish deliveries from just four vessels, every one of which they own.

Fortunately, that case came down as we had hoped. And Judge Gilliam rejected the challenges to the quota share system, to the limits on it. And upheld the government's -- ruled in favor of the government's -- that's the Magnuson Act, which includes a provision that the National Marine Fisheries Service takes steps to ensure that there is not excessive concentration in the quota share allocations. All of that was affirmed. The regulations stand in place.

And one of the points that we make in our complaint in this case is that one of the reasons this transaction should not be able to go forward is that it would result in Pacific Seafood acquiring additional quota share. They have had to divest down to -- by a

very significant share of the amount that they were over these caps. They had almost five years to do that. They did it just before the deadline and filed suit to challenge the caps. Those have now been upheld. They would move their share of the whiting harvest to over 21 percent if they were able to obtain the quota share that comes with a purchase of Ocean Gold Seafoods.

At this stage of the case where they filed this preemptive and premature motion for summary judgment, where discovery is not yet done, where their experts -- they have yet to prepare their own expert.

THE COURT: Not premature. I mean, anti-trust injury is a threshold matter. We're going to be spending a lot of money on a lot of discovery if we can't determine initially if your plaintiffs are the appropriate plaintiffs bringing the suit. It seems to me now is a better time than later to figure that out.

MR. HAGLUND: And I commend you to look at the cases that I have referenced here in a Section 16 Clayton Act injunctive-relief-only case, we are so far over the bar in terms of what we have to demonstrate in order to have anti-trust injury here.

THE COURT: Let me hear from the defense. I would like the response to address anti-trust injury. And not every practice that is going on in the fishing

industry with regard to this particular -- it seems like a focus really is on whether these are the appropriate plaintiffs, and I would like to focus on that if you could.

MR. FOSTER: Your Honor, did you want me to give a tiny bit of background?

THE COURT: If you would.

MR. FOSTER: Because of our audience, very briefly, some things that aren't apparent from the record. So one of the things, somewhat interesting facts, maybe, in light of the 9th Circuit opinion, there never was any substantive response on the merits to the motion for preliminary injunction, because the transaction had been withdrawn and terminated, effectively, but yet Judge Panner went ahead and issued an injunction.

The primary issue -- and I am giving you our perspective on this. I am not really trying to argue. But from our perspective, the primary issue that we were raising on appeal was the issue of the arbitrability of the underlying dispute, and whether the parties' Settlement Agreement in the prior Whaley case compelled the parties to go to an arbitration process to resolve any objections to the transaction, and thereby avoiding where we are today.

So that gives you just a little bit of a procedural background that may not be apparent from the record. So I will get to the heart of it now, Your Honor. You are correct, the relevant market definition is an absolutely threshold issue that plaintiffs need to address and define early on in the case, because that sets the parameters by which the economic analysis and anti-trust injury are assessed.

The definition of the relevant market is not a negotiation between competing expert reports. Plaintiffs file, and basically take a position with respect to the relevant market that they allege, or in this case relevant markets that they allege exist.

In this case, there were a myriad of relevant markets defined by both products and geography. The three products at issue are the sale by fishermen, shore side to processors of whiting -- which is a white fish in great abundance, but not all that popular in the US to eat -- shrimp and groundfish, trawl-caught, a specific way of catching groundfish. And groundfish includes a very wide range of species of fish, some more valuable than others.

The plaintiffs, through discovery responses and also in the expert report filed by their expert, defined three product markets in the West Port area --

West Port, Washington. Again, those three products that I just described, and they define the West Port market as a separate, independent economic market. And they also define some other markets down the coast.

Now, contrary to what Mr. Haglund said, and perhaps he misspoke, but I thought I heard him say that for a plaintiff or plaintiffs that are only seeking injunctive relief in a Clayton 7 Act claim, or a Section 2 claim -- in other words, only seeking relief under Section 16 of the Clayton Act, all they have to prove is just general standing.

Well, that isn't the law. The law, and the Cargo case speaks to this directly, is that anti-trust injury, either direct or actual or threatened, is still an element of a Clayton Act claim, even when the plaintiffs are only seeking injunctive relief.

And that injury, anti-trust injury is identical, whether it's a damage case or an injunction case. And in the injunction environment it simply added threatened injury. But you still have to prove the presence of injury or the likelihood of injury.

Now the 9th Circuit lays out a test -- I won't bore you with reciting it here. It's in our brief -- but a test and the requirements for proving anti-trust injury. And as we believe we have

demonstrated, and frankly we didn't demonstrate it. The plaintiffs demonstrated it. The plaintiffs are not market participants in any of the product markets in the defined economically distinct West Port, Washington, market, and they haven't, obviously, been able to identify any injury or threatened injury that they have suffered in that market, because they are not in the market.

THE COURT: What about the leasing issue, quota options? Does that get them into the market somehow?

MR. FOSTER: Well, Your Honor, I think what that gets is they are now -- and I think you have caught this. This is kind of a last-minute effort to try to survive here. There's an allegation that two of the plaintiffs have some quota. And the theory, I think, that is being advanced is without any evidence in the expert report, or anywhere else, defining what this is all about, we're hearing about it for the first time here, I think the theory is they own some quota.

And that quota, the price that they can get in the quota market, which is in selling the quota to somebody who wants to buy it, or leasing the quota for a year or two years, that their ability to recover economic benefits in the quota market will somehow be

adversely impacted by what is happening, or what they claim will happen in the West Port product markets.

So let me rephrase that again. I think their theory is if this merger acquisition were to go forward, they believe that that will depress the price for fish that is being sold shore side to processors in West Port. And from there, they are claiming that there is this derivative or pass-through impact of some kind to what they might receive for whatever quota they have, to whomever they might lease it, wherever that quota might actually be used.

So my -- I apologize for that, that's a little long-winded. But our response to that is that is at best some derivative injury. It is certainly a speculative injury, and it is not an injury that they have produced any evidence of, described in any detail. Most of what you heard today is not in the record when Mr. Haglund was describing about this whole leasing thing.

And if you recall some of the testimony in the record from the plaintiffs, I think one of them -- it might have been Mr. Whaley, said, I got such little quota, I really didn't pay any attention to it. It's of no importance to me.

So none of them deliver to West Port. None

of them indicated any desire to deliver to West Port -- excuse me. There was, I believe, Mr. Boardman at the preliminary injunction stage suggested that maybe he might want to go to West Port, and that he had plans to do something about going to West Port, but we know that never happened. And we know, based on their testimony, not only did that never happen, but that these three fishermen, the only fishermen remaining in the case, have -- I will call it committed relationships with specific processors.

One of the plaintiffs said, if Bornstein's went out of business or stopped buying from me, I would stop fishing and sell my boat. The others sell to Hallmark, or VC Fisheries. And they indicated great loyalty. And, I mean, I understand that. You have a relationship with a processor. You feel they have treated you well. You have a long-term business relationship, and you work that relationship over the long haul, and you fish for those processors.

But that certainly refutes any suggestion that they are likely entrants, planning to enter the West Port product markets that they defined.

Now Mr. Haglund mentioned the McCready case. And I think it's worth chatting about for a little bit, with the Court's indulgence.

THE COURT: These are the psychological services?

MR. FOSTER: It's the psychotherapy services case. It's the consumer, or the beneficiary under the health insurance plan who wanted to use psychologists for her psychotherapy treatment. The allegation was that the insurance company and psychiatrists had conspired together to exclude psychologists.

And contrary to the suggestion that Mr. Haglund, I think, advanced, the plaintiff in that case was a participant in the market. She was a consumer of psychotherapy services. And if that is in any way in doubt in the language of the McCready case, a year later in the Associated General Contractors case, the Supreme Court talked about McCready.

And they made it very clear that she was in the market for those services. She was a market participant directly harmed by the defendant's unlawful conduct.

There's some language in McCready that the plaintiff speaks to in passing in its briefing, although I didn't really hear Mr. Haglund talk much about it today. But I would like to address it, because I think it's, at least maybe on the Court's mind. And it's this

language from McCready about inextricably intertwined. I don't think any court -- and I don't think the Supreme Court suggested in that language, that that is a sliding door to open up anti-trust litigation to anyone who has an interest in fisheries, likes fish, went on a boat once.

The way that has worked out in terms of how anti-trust injury has worked out in the courts is if you are not a market participant, and you are not, like McCready, a consumer of the services within the market that is in dispute -- there have been a couple of cases which the court, I am sure has seen, because we have cited them, where courts have granted anti-trust standing to very particular plaintiffs. They are the plaintiffs who have been used by the wrong-doers to accomplish their ill deeds, if you will, in the relevant market.

So you will remember the case involving the employee who refused to execute the conspiracy to fix prices. What the Court found there was that he was a necessary instrument to accomplish the conspiracy, the effect of the conspiracy. He was the tool by which the conspirators were beating the competitors over the head. And in that rare case the Court found anti-trust standing for that individual because the means by which

the anti-trust wrongdoing was accomplished. He was the -- I am trying to remember, there's some colorful language in some of the cases. But, effectively, he's the fulcrum, or the device, the means by which -- the necessary means by which the conspirators in those cases were able to accomplish the results they were seeking to accomplish, directed to competitors and others in the relevant market.

So, I mean, Your Honor, I think that fairly summarizes what we think the state of the law is with respect to anti-trust injury for a Section 16 type plaintiff, seeking injunctive relief only.

THE COURT: What about an argument that -- Mr. Haglund's fall-back argument is, okay, maybe these plaintiffs haven't been participating in this particular market, but they participate in other markets. And by suppressing prices with this acquisition of the West Port market, it will necessarily result in suppression of prices along other markets on the West Coast?

MR. FOSTER: There's a couple of problems with that. One is an economic problem. They have alleged independent, separate economic markets. By definition, those markets are unrelated to each other from pricing influences. They are separate economic markets, separate participants, separate pricing demand

and functions. So it goes counter to the very notion of separate and distinct relevant markets to turn around and say, oh, yeah, but those relevant markets influence each other from a price perspective. That is how one normally goes about defining a relevant market is through the price effects within a given geography to determine whether or not you have the normal supply and demand and elasticity, and all the other economic analysis that goes on to define that distinct economic market.

So No. 1, they have a problem on the economics. No. 2, that kind of derivative impact has been held not to be within the scope of anti-trust injury; that it is not a direct impact, because of the speculative nature, to some extent, the difficulties of trying to determine --

THE COURT: The response there is, well, that's in the damage context, but we're looking for injunctive relief.

MR. FOSTER: It's the same for injunctive relief, Your Honor. It's not any different than that, if it has to do with causation and the approximate nature of the injury. Within the distinct relevant market you can assess direct injury to the participants in those markets.

When you talk about some markets, two or three and there are multiple markets down the road, then you are getting into this derivative impact that has not been found to be within the scope of anti-trust injury with the way the cases have analyzed them.

THE COURT: Thank you. Mr. Haglund --

MR. FOSTER: Your Honor, I would cite you to the American Ad Management case, which I think that very point is addressed.

MR. HAGLUND: Couple of quick points in response, Your Honor.

Mr. Foster is just not correct when he says that this leasing issue is something that we're putting in -- putting before you today. On page 7 of our brief we -- and Lloyd Whaley has a declaration we submitted in response to the motion for summary judgment, is -- they're excerpts of his deposition -- it's not a small amount.

He's earning an average of $110,000 a year leasing his Federal quota share. And we have this issue covered directly in paragraph 13 of the Sexton declaration, also submitted at that time, where he says, and I quote, To the extent market concentration within the processing sector on the West Coast results in suppression of ex vessel prices for Pacific whiting and

trawl-caught groundfish, there is no question the value of leasing quota for these same species will be reduced. So there's market participant status, even if we're locked into the six separate and distinct markets, as Mr. Foster emphasizes.

But the bottom line is, we're not through discovery yet, Your Honor. The Pac Fish unavailability, which still hasn't happened, blew up the schedule, as you know. It would be inconsistent with fundamental fairness here for us to not get the chance to continue with the balance of discovery, finalize our expert reports, and then let you consider whether or not we failed to meet anti-trust injury.

On this record, summary judgment can't be granted because we have these factual disputes related to the leasing that is a coast-wide, including West Port, situation. But the case is still, in terms of discovery, relatively young. And we need the opportunity to fully define these markets as precisely as happens when you get the chance to have this back-and-forth, the advocacy system --

THE COURT: Haven't you been defining the markets since the Whaley case? Is it substantially different? Aren't we talking about the same acquisition? How much more discovery and litigation --

MR. HAGLUND: Whaley was completely West Coast. The markets were defined as the West Coast in Whaley. And that's what Dr. Radtke put in his declaration in this case. They are claiming that we have defined it clearly and cleanly as six separate markets, and that's not really correct, because although he says that, that's -- he says, Within the West Coast there are these six port cluster dominant markets. But on another page he references the fact that they impact each other.

Mr. Foster is right that the way the law works, you have got to have separate -- you can't have interactions between them. This is a clarification that will need to be made down the road, consistent with the discovery. What is happening here is Pacific is trying to exploit -- they saw -- this is very unusual. I have never seen a situation, Your Honor, where defense counsel asks to take your expert's deposition after their first report, and before they issue their report.

This has been done because they saw an opportunity, given what the case law says, on separate and distinct. You can only look at each one separately. But that's not the totality of what Dr. Radtke says, and it's inconsistent with the record that he has in his first declaration in this very case.

With the substitution that has occurred, we can't veer significantly away from what he said, but we have -- we need to have the opportunity, with the benefit of discovery and the benefit of what their experts are going to say, to get our final report done. It's only then that you will be in a position to really assess this anti-trust injury issue. Thank you.

MR. FOSTER: Your Honor, may I --

THE COURT: Let me ask you a question, Mr. Foster. You know, if I rule today, I don't let them reopen discovery, and let's say I grant your motion, in terms of litigation strategy, don't you think the 9th Circuit is more likely to get hung up on the discovery issue than they might on the anti-trust, and look at this that the judge didn't look enough at what the extent of this market was? They didn't have enough information, they should have waited, and then we're going to be back here?

MR. FOSTER: I don't. I hope that wasn't a surprising answer.

THE COURT: Well, your prediction last time on the 9th Circuit wasn't so great. And now we're arguing the 9th Circuit over whether Judge Russo or Judge Hogan is deciding the arbitration.

I guess, I am asking, is there a reason --

Courts like to be safe, and we like to, maybe we should let discovery go, and maybe we will be exactly where we are, and I am going to be unconvinced as to market injury.

MR. FOSTER: A little history, and I know you will remember this. But after Dr. Radtke's report was served, we asked the Court to compel the plaintiffs to respond to discovery, which asked them to define these markets. And they did so, only after you ordered them to do that. And these are the markets that they defined, and we are now litigating. And those are the markets that I believe your order with respect to substitution means that those are the markets that we are litigating.

What Mr. Haglund apparently would like to do, and you get a sense of it, he would like a do-over. And the Court hasn't allowed him to do that. So I don't think any more discovery is needed, because the plaintiffs have defined their markets, and those are what we're litigating.

With respect to an anti-trust injury, I have to say I am a bit perplexed, because all the things that we're hearing about today is information that has been exclusively within the purview of the plaintiffs: We were surprised to learn that our client fishes

100 miles away and travels. We were surprised to learn that our client has leases and may lease some quota to people.

All of this information has been in the control of the plaintiffs. There's nothing here that has been withheld from them. And by the way, Your Honor, you may recall on this leasing issue, we had a big discovery fight. I am trying to remember when it was, but it was awhile ago. And we asked for production of the plaintiff's leasing quota information, and Mr. Haglund said that is absolutely irrelevant. And our request for that discovery was denied.

THE COURT: Right. I do remember that now that you have reminded me. I think I found it was not necessarily --

MR. FOSTER: None of these details are in the record. All of them should have been available to Mr. Radtke. None of them are in his report. There's nothing in the interrogatory responses that speak to any of these issues.

So I think this record is -- this has been expensive to date, Your Honor. No doubt about it. And there's nothing more that is going to be developed in this record, I think, that would assist you in understanding whether or not these plaintiffs are

participants in the marketplace. And they clearly aren't, based on their own testimony, and very detailed testimony at that. Thank you.

THE COURT: Thank you both. I appreciate it. I will -- I am hoping on all of these cases to get decisions really relatively quickly. So maybe within days, some may take a week or two.

All right. Which case are we going to move to next? And if people need to take a break in between, that's perfectly fine.

Mr. Haglund.

MR. FOSTER: I will move to the back of the courtroom.

(END OF PROCEEDINGS AT 3:06 P.M.)

STATE OF OREGON)
)ss
COUNTY OF YAMHILL)

I, Deborah L. Cook, RPR, Certified Shorthand Reporter in and for the State of Oregon, hereby certify that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing hearing; that thereafter my notes were transcribed by computer-aided transcription by me personally; and that the foregoing transcript contains a full, true and correct record of such testimony adduced and other oral proceedings had, and of the whole thereof.

Witness my hand and seal at Dundee, Oregon, this 1st day of April, 2018.

/s/ Deborah L. Cook

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Certified Shorthand Reporter
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WASHINGTON CSR #2992

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